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UNLIMITED JURISDICTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

vs.

CITY OF BURBANK, ET AL.,

Defendants.

CASE NO. BC 422 252

[Assigned to the Hon. John L. Segal,
Judge, Dept. "50"]

**REPLY IN SUPPORT OF MOTION FOR
EXPERT FEES**

Date: July 9, 2012
Time: 8:30 a.m.
Dept.: 50

Action Filed: 9/22/09
FSC: February 29, 2012
Trial: March 5, 2012

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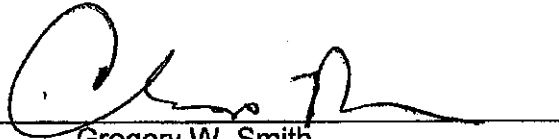
1 **TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that plaintiff William Taylor (hereafter "plaintiff") hereby files the
3 following reply in support of plaintiff's Motion for Expert Fees.
4

5
6 Dated:

6/28/12

7 By:



8 Gregory W. Smith
9 Christopher Brizzolara
10 Attorneys for Plaintiff
11 WILLIAM TAYLOR
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

After paying one alleged expert in the field of police practices (James Gardiner) in excess of \$170,000, and then agreeing to pay him up to an additional \$100,000 for his alleged "expert consultation and testimony", and paying at least two other alleged expert consultants (Tim Stehr and Patrick Lynch) tens of thousand of dollars, defendant now contests the comparatively minor expert fees requested by plaintiff. Defendant's description of plaintiff's experts as a "menagerie" is offensive¹, and defendant's hiring of multiple alleged experts in the same field is typical of defendant's "scorched earth" policies throughout this matter. Such conduct has cost the taxpayers of Burbank literally millions of dollars, and yet defendant now seeks to deny plaintiff recovery for the expert fees reasonable and necessary for plaintiff to properly litigate his illegal termination by defendant. As set forth below, plaintiff's requested expert fees in this matter are and were reasonable and necessary, and fully supported by the facts, events, and circumstances surrounding this case.

II. ALL OF PLAINTIFF'S EXPERT WITNESS FEES ARE PROPER AND SHOULD NOT BE APPORTIONED

In defendant's opposition to plaintiff's Motion for Attorneys Fees, defendant contended that plaintiff's attorneys fees should be reduced by 1/3 apportioned to the plaintiff's cause of action based upon *Labor Code* Section 1102.5. In the regard to the instant motion, defendant contends that plaintiff's attorneys fees should be reduced by 1/2 apportioned to the plaintiff's cause of action based upon *Labor Code* Section 1102.5. Defendant is apparently simply "pulling numbers out of a hat" in regard to its claims for apportionment of attorneys and expert fees, and apparently

1/

Plaintiff's police practices expert, Dr. Paul Kim, is a well-respected former LAPD Commander with a doctorate degree in the field of public administration. Ms. Smith has a master's degree in the field of business administration who has qualified to testify as an expert forensic economist in numerous trials and other proceedings. Dr. Leoni is a board certified specialist in the field of internal medicine. To refer to such highly accomplished and reputable professionals using terms synonymous with "zoo animals" is disappointing, is unprofessional, and is certainly not in accordance with the courtesy expected of attorneys in the State of California.

1 cannot even agree with itself upon the alleged proper amount of apportionment in this matter..

2 It was defendant, and not plaintiff, that proposed the use of a general verdict. Plaintiff's
3 counsel prepared and submitted special verdict forms to the Court and to defense counsel in
4 which the jury would have set forth specifically the bases for the jury's damages awards, and
5 defendant objected to using these special verdict forms. Defendant should not now be allowed
6 to speculate as to what portion of the expert fees in this case should be allocated to plaintiff's
7 *Labor Code* Section 1102.5 cause of action. Notably, defendant has failed to set forth any expert
8 fees requested by plaintiff which were incurred solely in regard to litigating plaintiff's claims under
9 *Labor Code* Section 1102.5 and which would not have been incurred had plaintiff only had a
10 cause of action for retaliation in violation of FEHA. As such defendant is unable to carry its
11 burden of setting forth any expert fees sought by plaintiff that were solely related to the *Labor*
12 *Code* Section 1102.5 cause of action.

13 In any event, the litigation of plaintiff's FEHA claims were and are inextricably intertwined
14 with the litigation of plaintiff's *Labor Code* Section 1102.5 claims. Plaintiff's reporting and/or
15 protesting activities that violated FEHA were and are also activities protected by *Labor Code*
16 Section 1102.5, since violations of FEHA are violations of state statutes. By analogy, as held in
17 *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal. App. 3d 983, 997.

18 "Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a
19 trial court has discretion to award all or substantially all of the plaintiff's fees even if the
20 court did not adopt each contention raised."

21 Further, even where a plaintiff prevails on only one theory is not dispositive. As stated in
22 *Sokolow v. County of San Mateo* (1989) 213 Cal. App. 3d 231, 250:

23 "Attorneys generally must pursue all available legal avenues and theories in pursuit of their
24 clients' objectives; it is impossible, as a practical matter, for an attorney to know in advance
25 whether or not his or her work on a potentially meritorious legal theory will ultimately
26 prevail." See also, *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th
27 418, 423 - 425.

28 Here, in light of the strong interrelationship between plaintiff's claims, the Court should not
apportion any of plaintiff's requested expert fees.

1 **A. All of Former LAPD Commander Dr. Paul Kim's Expert Witness Fees Are Proper and**
2 **Should Not Be Apportioned**

3 On the one hand, defendant complains that "Mr. (sic) Kim evaluated only a very limited
4 portion of the record" (Opp., 2: 27 - 28), but on the other hand complains that he spent too much
5 time reviewing the record (Opp., 3: 6 - 8). What is clear is that Dr. Kim's fees for "reviewing the
6 record" were a fraction of the fees paid to defendant's alleged police practices expert James
7 Gardiner. As testified by Mr. Gardiner at trial, he had previously been paid in excess of \$170,000
8 for his alleged services in "reviewing the record" (i.e., the IA files regarding Portos I) and then
9 conducting the series of sham investigations that constituted Portos II. He further testified that
10 defendant had agreed to pay him up to another \$100,000 for his "expert" services in this case.

11 Apparently not satisfied with Mr. Gardiner, defendant next attempted to designate another
12 police practices expert, James Voge, which attempted tardy designation was denied by this Court.
13 Presumably, defendant provided Mr. Voge with information and materials to review regarding this
14 case, and paid him for such review, so that defendant would be prepared to immediately produce
15 him for deposition which defendant would have been required to do had its tardy motion to
16 designate Mr. Voge been granted. Notably, defendant's opposition is silent as to the total fees
17 defendant paid Mr. Voge to "review the record" in this matter, and therefore has provided no basis
18 for asserting that the total fees paid to Dr. Kim are excessive..

19 Further, defendant, utilizing its unlimited tax payer funded resources, also paid its former
20 Chief of Police Tim Stehr and former Captain Patrick Lynch tens of thousands of dollars as
21 alleged "expert consultants" in the field of police practices in regard to this action and other cases
22 arising from the sham Portos II investigation. Dr. Kim's fees are a fraction of what defendant has
23 paid and has promised to pay its alleged expert witnesses and/or expert consultants for their
24 alleged expert services in the field of police practices in its losing effort to defend this matter.
25 Defendant has failed to set forth any legitimate reasons why plaintiff's police practices expert
26 should be paid less than defendant's bevy of alleged police practices experts and/or consultants
27 where plaintiff won, and defendant lost, the instant case.

28 Further, Dr. Kim's testimony was reasonable and necessary in this case. Defendant

1 contended in this case that plaintiff was terminated for purportedly obstructing the Portos I
2 investigation and providing untruthful statements in Portos II. These were the grounds specifically
3 alleged by defendant as the legitimate non-retaliatory reasons for terminating plaintiff. Dr. Kim's
4 testimony was specifically directed to establishing that plaintiff acted properly in regard to the
5 Portos I investigation, and that defendant's handling of the Portos II investigation did not comply
6 with proper police procedures.

7 The *McDonnell Douglas* burden-shifting framework applies in FEHA retaliation cases.
8 *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1044. Once, as here, the plaintiff has
9 established a prima facie case, the employer must then articulate a legitimate, nonretaliatory
10 reason for each of the adverse employment actions taken. If the defendant is able to do so, then
11 the plaintiff must prove the employer's reason is a pretext. Thus, Dr. Kim's testimony was directly
12 related to the prosecution of plaintiff's FEHA claims, including the issue of pretext. Dr. Kim's
13 testimony was utilized to assist in establishing that defendant's purported reasons for terminating
14 plaintiff were a sham and a pretext for retaliation prohibited by FEHA, based upon Dr. Kim's
15 testimony that plaintiff acted in accordance with proper police practices in Portos I, and that
16 defendant's handling of the Portos II investigation did not comply with proper police procedures.
17 As such, all of Dr. Kim's fees were reasonable and necessary, and should be awarded to plaintiff.

18 **B. All of Plaintiff's Economist Karen Smith Expert Witness Fees Are Proper and Should**
19 **Not Be Apportioned**

20 Defendant next complains that Ms. Smith made revisions to her economic damage
21 calculations prior to testifying at trial to assure that her expert testimony at trial was accurate.
22 Apparently, in defendant's world, it is unnecessary for professionals to review and revise their
23 work. Hopefully, defense counsel will return to the City of Burbank any monies they billed for
24 reviewing and revising their work throughout this case. In the real world, professionals such as
25 physicians, attorneys, and economists routinely review and revise their diagnoses, legal opinions,
26 and economic calculations as they continue to further evaluate the matters on which they are
27 working in order to assure that their final opinions are as accurate as possible. Hence the
28 phrases, "practicing medicine" or "practicing law". Ms. Smith's revisions of her economic

1 calculations to assure her calculations were accurate are no different.

2 In any event, defendant was notified of Ms. Smith's revisions in sufficient time before her
3 testimony to allow defense counsel time to properly prepare to cross-examine her regarding such
4 revisions. As defendant admits, Ms. Smith's revised calculations were substantially less than her
5 original calculations, and therefore defendant suffered no prejudice by Ms. Smith revising her
6 economic damages calculations. Both plaintiff's counsel and defense counsel also brought to the
7 jury's attention that Ms. Smith had revised her calculations, so that the jurors were not misled in
8 any manner and were free to consider the fact that Ms. Smith had revised her calculations in
9 appropriately weighing her expert testimony. Defense counsel was apparently satisfied that the
10 bulk of Ms. Smith's revised calculations were accurate since defense counsel elected not to call
11 its own retained expert economist, David Weiner. Notably, defendant's opposition is silent as to
12 the total fees defendant paid Mr. Weiner for his services, and therefore has provided no basis for
13 asserting that the total fees paid to Ms. Smith are excessive.

14 Ms. Smith's testimony was reasonable and necessary, and contributed to the success of
15 this litigation, since the bulk of the damages awarded to plaintiff (in excess of \$1,000,000) were
16 economic damages consistent with the economic loss calculations of Ms. Smith. As such, all of
17 Ms. Smith's fees were reasonable and necessary, and should be awarded to plaintiff.

18 **C. All of Plaintiff's Internist Sean Leoni, M.D. Expert Witness Fees Are Proper and**
19 **Should Not Be Apportioned**

20 Defendant next objects to the expert fees of plaintiff's internist, Sean Leoni, M.D., who
21 testified at trial regarding the physical manifestations and symptoms, and causes thereof, of the
22 health conditions supporting the non-economic damages claimed by plaintiff. Defendant's
23 objection to Dr. Leoni's fees is primarily based upon Dr. Leoni not submitting a bill for his services,
24 although upon information and belief Dr. Leoni testified at trial regarding the amount of his fees
25 for testifying at trial (and certainly could have been cross-examined by defense counsel on this
26 issue at the trial.) Nonetheless, plaintiff has submitted an invoice for his expert witness fees for
27 testifying at trial, which is attached hereto as Ex. "A". Dr. Leoni's expert fees in the amount of
28 \$3000.00 for testifying at trial are consistent with his customary rates for providing expert

1 testimony, and are also consistent with the rates (and in fact lower than many) of the rates
2 charged by other physicians of comparable background, training, and experience for preparing
3 for, traveling to and from, and testifying at a trial.

4 Dr. Leoni's testimony was reasonable and necessary, and contributed to the success of
5 this litigation, since the damages awarded to plaintiff included non-economic damages consistent
6 with the testimony of Dr. Leoni regarding the physical manifestations and symptoms, and causes
7 thereof, of the health conditions supporting the non-economic damages claimed by plaintiff. As
8 such, all of Dr. Leoni's fees were reasonable and necessary, and should be awarded to plaintiff.

9 **D. All of Plaintiff's Treating Physician Stanley Majcher, M.D. Expert Witness Fees Are
10 Proper and Should Not Be Apportioned**

11 Defendant also contests paying for the cost of asking Dr. Majcher expert opinion questions
12 during the deposition that defendant noticed and took of Dr. Majcher.

13 C.C.P. § 2034.430 provides as follows:

14 (a) Except as provided in subdivision (f), this section applies to an expert witness, other
15 than a party or an employee of a party, who is any of the following: ...

16 (2) **A treating physician and surgeon or other treating health care practitioner who
17 is to be asked during the deposition to express opinion testimony, including opinion
18 or factual testimony regarding the past or present diagnosis or prognosis made by
19 the practitioner or the reasons for a particular treatment decision made by the
20 practitioner, but not including testimony requiring only the reading of words and symbols
21 contained in the relevant medical record or, if those words and symbols are not legible to
22 the deponent, the approximation by the deponent of what those words or symbols are. ...**

23 (b) **A party desiring to depose an expert witness described in subdivision (a) shall
24 pay the expert's reasonable and customary hourly or daily fee for any time spent at
25 the deposition from the time noticed in the deposition subpoena, or from the time
26 of the arrival of the expert witness should that time be later than the time noticed in
27 the deposition subpoena, until the time the expert witness is dismissed from the
28 deposition, regardless of whether the expert is actually deposed by any party
attending the deposition." (Emphasis added.)**

Therefore, it is irrelevant whether or not Dr. Majcher testified at trial. Nothing in C.C.P. §
2034.430 requires that a treating physician be called as a witness at trial before he or she is
entitled to be paid the physician's reasonable and customary hourly or daily fee. If defendant
believed that Dr. Majcher's designation as a treating physician by plaintiff was not proper, then
defendant's remedy was to file a motion to strike Dr. Majcher as an expert witness or to move to
exclude him testifying at trial. Instead, defendant deposed Dr. Majcher, presumably to attempt

1 to obtain information that could be used by defendant to attack plaintiff's claims for non-economic
2 damages.

3 Defendant again engages in frankly offensive and unnecessary hyperbole by claiming that
4 Dr. Majcher attempted to "extort a higher rate" at his deposition. Instead, Dr. Majcher simply
5 asked that defense counsel comply with the law as set forth in *C.C.P.* § 2034.430 and pay Dr.
6 Majcher his reasonable and customary hourly or daily fee once it became clear that defense
7 counsel was not simply asking Dr. Majcher to only the "read the words and symbols contained in
8 the relevant medical record or, if those words and symbols are not legible to the deponent, the
9 approximation by the deponent of what those words or symbols are" as defined by *C.C.P.* §
10 2034.430(a)(2).

11 A review of even the scant portions of the deposition testimony of Dr. Majcher attached by
12 defendant in support of its opposition reveals that counsel for defendant asked Dr. Majcher
13 questions at his deposition entitling him to the fees required to be paid pursuant to *C.C.P.* §
14 2034.430(a)(2). For example, defense counsel inquired of Dr. Majcher which lab studies assisted
15 Dr. Majcher in diagnosing plaintiff's gastro-intestinal conditions, and what tests supported his
16 diagnosis of plaintiff's health care condition. (Opp., Ex. E, 13: 1 - 8; 13: 24 - 14: 1.) Defense
17 counsel further inquired of Dr. Majcher whether any of the history he obtained from the plaintiff,
18 or whether any observations he made as a physician, supported his diagnosis of plaintiff's
19 gastroesophageal reflux disease. (Opp., Ex. E, 13: 11 - 14; 15: 1 - 4; 15: 14 - 19). Defense
20 counsel further inquired of Dr. Majcher what was the basis of his diagnosis of hypertension in the
21 plaintiff, a question that again quite clearly called for an expert opinion. (Opp., Ex. E, 16: 13 - 14.)

22 As such, defense counsel was obligated and remains obligated to pay Dr. Majcher for his
23 testimony in accordance with the provisions of *C.C.P.* § 2034.430. Defendant should therefore
24 be required to pay \$545.00 for requiring Dr. Majcher to provide his non-retained expert opinion
25 testimony as a treating physician in response to the questions asked by defense counsel at his
26 deposition noticed by defendant.

1 **III. CONCLUSION**

2 Plaintiff's motion for expert fees should be granted in its entirety, and plaintiff should be
3 awarded the full amount of the expert fees requested therein.

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5 Dated: 6/28/12

Respectfully Submitted:

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8 By: 

9 Gregory W. Smith
10 Christopher Brizzolara
11 Attorneys for Plaintiff
12 WILLIAM TAYLOR
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PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years of age, and am not a party to the within action; my business address is 9100 Wilshire Boulevard, Suite 345E, Beverly Hills, California 90212.

On the date hereinbelow specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Beverly Hills, addressed as follows:

DATE OF SERVICE : June 29, 2012

DOCUMENT SERVED : **REPLY IN SUPPORT OF MOTION FOR EXPERT FEES**

PARTIES SERVED : **SEE ATTACHED SERVICE LIST.**

XXX (BY FEDERAL EXPRESS) I caused the aforesaid document(s) to be delivered to Federal Express either by an authorized courier of Federal Express or by delivery to an authorized Federal Express office in a pre-paid envelope for overnight delivery to the addressee(s) as shown on the Service List.

XXX (BY ELECTRONIC MAIL) I caused such document to be electronically mailed to **Christopher Brizzolara, Esq.** at the following e-mail address: samorai@adelphia.net.

XXX (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

— (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED at Beverly Hills, California on June 29, 2012.

Selma I. Francia

SERVICE LIST

WILLIAM TAYLOR v. CITY OF BURBANK
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC 422 252

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